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NO. 96-891

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ALBERT W. JORDAN
DISABLED VETERAN — PETITIONER

VS.

KENTON COUNTY OF KENTUCKY BOARD
OF EDUCATION, ET AL — RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF TO: *RESPONDENTS' BRIEF IN OPPOSITION*

ALBERT W. JORDAN
DISABLED VETERAN
PRO SE
5855 S. Herringer Road
Alexandria, KY 41001
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PURPOSE OF THIS REPLY

The Petitioner's intent in this Reply is to request this Court to apply Supreme Court precedent to the Veteran's Reemployment Rights claims of Albert W. Jordan as a disabled veteran. Thus far, the U.S. District Court erroneously dismissed the claim due to an incorrect application based not on federal law but merely on an opinion of the Kentucky attorney general in regard to a very different case.

This claim has great general impact beyond its effect on these particular litigants, given the vast number of veterans, disabled veterans, and handicapped people who face discrimination in the job market as they assert their legal rights.

Furthermore, although this claim is not necessarily in conflict with previous Supreme Court decisions, it does raise interesting and specific questions fundamental to the Discovery process and to disabled veterans rights. Granted some aspects of the law are vaguely worded, perhaps intentionally so; therefore an adequately trained attorney could probably build a plausible-sounding case for or against any veteran. ~~This *pro se*~~ Petitioner lacks that training and he cannot afford an attorney; therefore he requests the Court to show some mercy since this is a low-budget home-spun effort. As one of the local farmers is fond of saying, "Poor people has poor ways of doing things."

In asserting his rights under the Veterans' Reemployment Rights Act, Petitioner has struggled through a seemingly endless ordeal, but has emerged tempered with the conviction of the justness of his claim. Throughout the process he has been impelled by three guiding principles: first he has cleanly fought a good fight for a just cause, and second (despite the unfairness of what has transpired at the administrative and lower court levels) Albert Jordan has an enduring, deeply-seated faith in America and its legal system; and third this attempt at justice strikes a blow for those veterans and others whose rights were trampled on, and who became disparaged by the establishment or who died, thus defaulting on their rightful claims.

REPLY TO: *RESPONDENTS' STATEMENT OF JURISDICTION*

This Court has jurisdiction to review Appeals Court's decisions, as stated by the Respondents; however, the Supreme Court has the power to settle important federal questions (RULE 10). Obviously the Respondents are attempting to limit the issues in their favor. Rule 15-8 permits the submission of new cases, new legislation, and other intervening material not available at the time of the party's last filing. In sum, this Court has a broader scope of powers than Respondents would prefer in this case.

Petitioner Albert W. Jordan, disabled veteran, files this Reply in order to contrast statements made by the Respondents with actual fact, not the truth as embellished by the Respondents. Hopefully this Court will review every pleading in the records of the lower courts before assuming the correctness of either Petitioner or Respondents.

RESPONSE TO *RESPONDENTS' STATEMENT OF THE CASE*

Albert Jordan reapplied for his for former teaching position with accommodations as a disabled veteran. This can be proven by information contained in his application for reemployment, which Kenton Board refused to release during discovery. The U.S. Department of Labor instructed Kenton Board to reemploy Albert Jordan with tenure. Upon reemployment the veteran objected to Kenton Board's refusal to reemploy him with at least his former duties, since those assignments were available, along with his previous supplemental contract. Board administrators informed Albert Jordan that the former assignments and supplemental contract were already contracted to another teacher, (who by the way was less qualified). Kenton Board also refused to release a copy of the pre-service supplemental contract during discovery. Kenton Board refused to release any records that would document and prove Albert Jordan's claims. Kenton Board violated Albert Jordan's rights in many ways under federal and state law, in addition to the contractual agreement.

The retirement system, KTRS, provided many inaccuracies as well. According to retirement counselors, KTRS denies all disability claims until a court requires it to provide benefits,

unless it wants to be capricious. This opens the door to abuse. Even the most clear-cut cases are contested which in effect requires an applicant to hire an attorney who fights for benefits for years, usually at an hourly rate.

KTRS maintains the disability occurred during the military, therefore it takes the position Albert Jordan should not be covered by the plan. Actually the *injury* occurred in the military; whether or not it was disabling to the occupation of teaching had not necessarily been determined when he was reemployed. Social Security Administration recognizes the injury as occurring during the military, however SSA determined the period of disability began when the veteran last worked.

In the Response, KTRS states: "Petitioner did not apply for disability benefits until 1988, four years after his eligibility to file for those benefits expired. That is a deliberate, flat-out bald-faced misstatement of fact. (See attachment)

Actually Albert Jordan, upon receiving his letter of non-renewal of the teaching contract in the spring of 1983, immediately went to the office of Andrew Christofield and David Webb and telephoned KTRS and requested an application for disability benefits in the presence of Webb and Christofield. As one can easily determine, KTRS received the call and forms were to be sent as requested, but another note indicates that another person over-rode that request. Despite telephone calls and letters requesting application forms, no forms were sent. (See attachments Exhibits 1, 2, 3) Only after he hired an attorney who charged $450 for making two calls and writing two letters did Albert Jordan get an application form. This was in 1988 when he made the request in person and insisted on not leaving the Frankfort office without an application for disability benefits. So indeed the Petitioner did make repeated attempts to make application for disability retirement benefits within a timely fashion, however KTRS used deceit and treachery to create a technicality upon which it could try to rely on to deny the veteran his rightful benefits.

Contrary to the wishes of the respondents, there are many compelling reasons that this court should grant a writ of certiorari. The foremost reason is that providing Albert Jordan the relief he seeks, i.e. reinstatement with seniority and back benefits and the right to work with

accommodations or to reapply for disability retirement benefits, would be the just disposition of this claim. To do otherwise by allowing the Respondents to prevail would be to reward lying, cheating, and manipulating. Also the decisions of the Supreme Court, and the lower courts have indeed departed from usual and accepted courses of proceedings in deciding Petitioner's claims. The questions as stated in the petition are unique and specific; however they are not necessarily in conflict with prior rulings of this Court or federal law, the state law of Kentucky in the early 1980's, or present Kentucky law, or KTRS regulations.

Conflict with the lower courts,

What has occurred in the lower courts has been that the judges have not granted this petitioner the powers of discovery, over his protests. The attorneys have been permitted to falsify information with impunity and to evade cooperation with what limited Discovery that did occur. It seems as if in a perverse and surreal manner the courts have sent a message to the Respondents, "You may lie and interpret the law however you want, and we shall go along with it."

The Court should grant the writ of certiorari and clarify its interpretations of the legislative intent of veterans' laws. Frankly speaking, in researching the available law related to this claim the veteran found some aspects cut-and-dried, i.e. the issue of counting military service time towards seniority. Other issues may be somewhat arguable.

The most troublesome and disturbing aspect of this case has been that the U.S. attorney pretends to investigate a veterans claim, and (theoretically) if the right criteria are met, the U.S. attorney will represent the veteran in federal court as provided by law. In reality this never happens, according to the U. S. attorney's office and District Court Judge William Bertelsman. What does happen is the veteran is deliberately duped into a delay which is later held against him by *laches*. In short the agencies that are supposed to help him actually work against the veteran. This is also true of the service agencies (such as the DAV) which do not get involved with reemployment rights claims while that involvement should be the most important function of those agencies. By not addressing these issues, this Court is condoning these practices which boil down to fraud or, to put it mildly - broken promises. This Court should require the Justice Department to represent veterans or to cease from pretending to do so.

REPLY TO: *A. PROCEEDINGS AND DISPOSITION OF CASE BELOW*

Without granting Petitioner the powers of Discovery the U.S. District Court granted Respondent's motions to dismiss based on an unsupported affidavit in which the superintendent of schools alleged that the school board's ability to defend against the veteran's claim was prejudiced by the passage of time (presumably caused by the veteran). This is an ironic distortion of the truth and a classic case of blaming the victim. Naively the Petitioner assumed that Discovery would be granted, that the judge would give him a fair hearing of the issues, that federal law would be considered in federal court, and that since the records the school board and the KTRS are mandated to maintain speak for themselves, certainly then the Respondents would not be permitted to falsify and withhold documents and information. However this was not the case. Also he erroneously believed that the government (justice department and Department of Labor) would cooperate by releasing their records in a timely manner.

The veteran (petitioner) maintains that the court granted the motion to dismiss prematurely because it was based on unfounded allegations of prejudice and because no real Discovery took place. Initially the District Court permitted the veteran to "bark up the wrong tree" by falsely leading him to believe that there was some hope that the U.S. attorney would act. This was time wasted that could have been used for Discovery. The District Court knew that the U.S. Attorney never acts in favor of the veteran in court. Obviously the purpose of the U.S. Attorney in this case was to frustrate and vex the veteran into giving up hope, or in the very least to delay him, thereby adding to a default on *laches*.

In the PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT the Petitioner vigorously pleaded for Discovery, to no avail by the District Court. Undoubtedly real Discovery at that point would have proven the veteran's claim, but the defendants intended to avoid it at all costs and the court was eager to grant defendants' wishes.

What is puzzling to Albert Jordan in that Judge Bertlesman denied the claim and dismissed the case based on an opinion of the Kentucky Attorney General without addressing federal law.

In a meeting with the applicant, KTRS attorney James Baker conceded that under recent changes in Kentucky statutes, Albert Jordan would be clearly entitled to disability benefits. He further added that this veteran has a valid claim, however KTRS refuses to provide benefits until a court of law requires it.

Therefore the position that KTRS has taken is frivolous and vexatious to this proper claim. Obviously the Respondents feel they have something to gain and nothing to lose by waging what should be a losing battle. If there is no penalty for a frivolous defense, there should be one. The Court should consider this issue and provide penalties, unless it is the intent of the government to drag out veterans' claims *ad infinitum*.

B. THE COURTS IMPROPERLY DISMISSED AND UPHELD ALL CLAIMS AGAINST KTRS

Contrary to Respondent's views the Petitioner's disabling injury occurred in the military, however his "period of disability" began when he last worked, according to the Social Security Administration. Kenton Board illegally fired Albert Jordan "without cause" to deprive him of his federal reemployment rights. Federal law and Kentucky state law require Kenton Board and KTRS to provide this disabled veteran the relief he seeks. The question remains: "will the court system enforce the law or allow Kenton Board or KTRS to evade their responsibility through treachery and deceit?"

C. THE COURTS BELOW ABUSED THEIR DISCRETION

Albert Jordan correctly argues that this Court should grant the petition for certiorari because summary judgment was granted against him before Discovery could occur. Respondents falsely state there is no evidence that Albert Jordan informed the court he needed additional Discovery in order to properly oppose Respondents' motion. The records clearly show Albert Jordan repeatedly pleaded the District Court for more discovery. In District Court he called for Discovery to shed light on telephone conversations between KTRS and himself during 1983 when he attempted many times to apply for benefits and KTRS refused to send forms.

Albert Jordan repeatedly begged the District Court to grant discovery to obtain key documents in his personnel file at Kenton Board. In *Objection to Courts' Order* and *Motion for Reconsideration* Albert Jordan demonstrated the critical need for Discovery. (See Prayer-Joint Appendix)

In *RESPONDENTS BRIEF IN OPPOSITION*, Respondents distort the court's records and draw false conclusions. ~~The records clearly show that~~ Respondents not only were uncooperative in what little limited Discovery that did occur, they went to extremes to falsify, destroy, and hide records that would prove the claims of the veteran.

Kenton Board and KTRS have never cooperated in Discovery, and they are averse to Discovery now. The fact remains that Discovery is essential in the case, and the courts have so far not provided the Petitioner the full powers of Discovery lest he prove his claim. To this day Albert Jordan has not had a fair hearing to his claim. Again the lack of Discovery has been the intent of Respondents, and the abuse of discretion of the lower courts. Albert Jordan pleads for Discovery now as he has at every court level.

Even during Office of Civil Rights investigation, Albert Jordan pleaded for additional Discovery and complained about the lack thereof, and appealed the findings of the OCR investigation on that basis and on the false conclusions that were drawn. Hopefully this Court will not blame the victim, as Respondents intend. Instead let the Court blame the manipulators.

Contrary to the false statements of Respondents and the faulty logic and legal arguments they have provided in the *Brief of Opposition*, the Petitioner has replied with this correction of their false reporting of what is contained in the records below, and the legal arguments based thereon. The Petitioner begs this Court to interpret this claim on the merits, not on technicalities created by Kenton Board and KTRS which were designed to evade their responsibilities under federal law. This Supreme Court should ask the questions, "which side wants all the facts and issues considered, and which side wants to suppress facts? Why?"

The veteran assumed that the judge in a federal court would consider state law concerning a federal question, then contrast state and federal statutes to determine which offers the greater protection to the veteran. Apparently that was not the case.

REPLY TO: *B. CORRECTION OF MISSTATEMENTS IN PETITION*

Respondents' attorneys label the Petitioner's statement "unsupported charges of wrongdoing against various employees and agents of Respondents." All the statements of the Petitioner are factual: if they are unsupported that is because Respondents have been able to evade Discovery. All of the statements are relevant to the petition. This court should permit Discovery and then decide the relevance of the particulars. The Court should take notice of which side wants all information to be considered and which side wants to suppress factual information.

REPLY TO RESPONDENTS: *REASONS FOR DENYING THE WRIT*

A. PETITIONER'S FAILURE TO RAISE CERTAIN ISSUES BELOW DEPRIVES THIS COURT OF JURISDICTION TO HERE (SIC) THOSE CLAIMS.

Now the Respondents are trying to limit the powers of the United States Supreme Court. Rule 10 governs Review on Certiorari. This Court can rule on important federal questions and consider any information it deems necessary.

The U.S. Court of Appeals improperly decided an important question of federal law that has not been, but should be, settled by this Court, and it decided an important federal question in a way that conflicts with relevant decisions of this Court. Nothing precludes this Court from addressing the issues stated in the petition. All issues are properly preserved for this Court's review. No issues are deemed waived, unless of course Respondents' attorneys do the deeming. All of the Respondents reasons for denying the writ are false.

a. The Board's record-keeping was not a failure: rather it was a cover-up of a deliberate attempt to violate the veteran's federal rights by evading accommodations.

b. This is not the first time a pre-employment physical was addressed. The record of the federal district court can verify this in Memorandum in Response to Motion to Dismiss.

c. Petitioner has always argued that he had a right to be employed as a disabled veteran.

d. Petitioner constantly complained of harassment by board administrators during reemployment.

e. The thrust of this lawsuit is that tenure and seniority and many other benefits were denied.

f. Petitioner focused on the question of the board's reliance of the OCR investigation, in particular on OCR's use of anonymous and unsworn testimony, and the unfairness of barring Albert Jordan to cross-examine witnesses.

g. Petitioner has veterans employment rights guaranteed by state law, which Kenton Board and KTRS violated.

h. Petitioner raised the issue that although Kentucky state law provides veterans rights to employment, it is quite vague and federal law clearly offers more protection. The revisions to Kentucky statutes since 1982 merely brought Kentucky in line with federal law already in effect.

i. The vagueness of this statement makes responding to it difficult.

B. Contrary to the wishes of the Respondents, the Court does not have to base its decision on this claim under the law as it existed when he first became "eligible" for his pension. The Supreme Court of the United States has the discretion to base this claim under present law. As the Petitioner demanded in the lower courts, the Respondents should be estopped from demanding that Petitioner meet their "impossible deadline" because they did not allow Petitioner's timely attempts to make application for disability benefits. In effect KTRS took steps to ensure Albert Jordan was never eligible; KTRS refused to provide forms or accept Albert Jordan's timely application. If this is legal then any insurance company should never be compelled to pay a claim if it can stall an application until a deadline has passed. This Court has the jurisdiction to determine if this case must be considered by the state and federal laws as written in 1982-83 or if any revisions to KTRS, Kentucky Law, or federal statutes or court cases since are applicable.

In short this Court should carefully review the lower courts records, and it should consider recent rulings and regulations.

APPENDIX A

1808 West End Avenue, Room 716
Nashville, Tennessee 37203-2583
Telephone: (615) 251-5906

August 25, 1982

In reply refer to: File No. 41-7759(35)

Mr. Robert E. Ruberg
Ruberg, Osborne and Taylor
600 Greenup Street
P. O. Box 187
Covington, Kentucky 41012

Dear Mr. Ruberg:

This is in further reference to the reemployment rights inquiry of Mr. Albert W. Jordan. In order to advise Mr. Jordan of his status under the reemployment rights statute additional information would be appreciated.

Under the reemployment statute a returning serviceperson should be restored to his position at a level reflecting the training and experience he had when he left, plus appropriate credit for any like or related training and experience he acquired in the military.

If he still did not complete the specific amount of training and experience necessary for a complete school year (minimum of one-hundred forty (140) days of teaching), this person should be restored and allowed to teach an additional twenty-five (25) days at which time he should be credited with an additional complete school year.

After the successful completion of the twenty-five (25) days, Mr. Jordan would be entitled to receive a continuing contract and a $300.00 raise if the additional complete school year would meet the number of years of experience requirement necessary for salary and tenure.

Did Mr. Jordan have like or related training and experience in the military?

If Mr. Jordan completes successfully an additional twenty-five (25) days of teaching will he have met the year requirements for salary and tenure?

If completion of the additional twenty-five (25) days plus another complete year credit is not enough to meet the year requirements for salary and tenure when will Mr. Jordan have the necessary time in to gain tenure and the salary increase?

Sincerely,

STEPHEN F. JEROUTEK
Area Administrator

SFJ:dj

APPENDIX B

1808 West End Building, Room 716
Nashville, TN 37203
Telephone: 615/251-5906

December 3, 1982

In reply refer to: File No. 41-7759(35)

Mr. Robert E. Ruberg
Ruberg, Osborne & Taylor
Law Offices
600 Greenup Street
P. O. Box 187
Covington, KY 41012

Dear Mr. Ruberg:

This is in further reference to Mr. Albert Jordan's reemployment rights claim against the Kenton County School Board. We received your letter dated October 27, 1982, with a copy of the pertinent information from the Kentucky State Law. As you may know, when state law conflicts with the Federal Statute; Federal law supersedes the state law.

According to the Veterans Reemployment Rights Statute when an employee leaves a position to enter military service; serves honorably; and makes timely application for reemployment; he should be reinstated as though he had never left his employment.

Since Mr. Jordan would have been eligible for tenure at the end of the 1982 school term but for his absence in the military; he should have been granted such benefit upon his return to employment.

He has been granted salary for five years of experience, and is satisfied with that; however, he has not been fully restored because of his lack of tenure.

If Mr. Jordan would not have been offered a continuing contract for the 1982-83 school term, you should provide documentation that he was not performing his duties properly to warrant retention by the School Board. If you have periodical evaluations of the teachers so that they are aware of any shortcomings which would serve to deny them an opportunity to continue with the school board, please send copies of these documents. Absent any such documentation, this office must maintain the position that Mr. Jordan has been improperly denied benefits protected by the Veterans Reemployment Rights law.

Please let us hear from you by the close of business on December 17, 1982, regarding the steps you will take to resolve this claim.

Thank you for your continued cooperation.

Sinnerely,

STEPHEN F. JEROUTEK
Area Administrator

SFJ:JDW:lmt

BEST AVAILA

5-26-95

Mr. Bill Pelfrey:

Please submit to me copies of all documents regarding my employment with Kenton County Bd. of Education including those at the central office and those at Scott High School and any document pertaining to me whatsoever.

I am especially concerned about the lack of my original application for employment and (2) my reapplication form prior to reinstatement for the 1982-1983 school term.

Since these documents may be vital to a claim in Federal Court I must ask that they be notarized as official copies.

(3) I also need in particular a copy of my 1981-82 teaching contract showing a breakdown of my teaching duties salary and salary for

BLE COPY

Appeal [illegible]
[illegible] earlier dates.

Sincerely,

Albert W Jordan

400-80-3058

P.S. Thank you for your cooperation

5855 S. Herringer Rd
Alexandria, KY 41001
606 635-1337

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Albert W. Jordan

Albert W. Jordan
Disabled Veteran, *pro se*

Date: Jan. 22, 1997

CERTIFICATION

I hereby certify that I have, this 22 day of January, 1997 mailed a copy of the foregoing to:

James M. Baker, Esq.
479 Versailles Road
Frankfort, KY 40601

and

Donald J. Ruberg
209-C Thomas More Park
P.O. Box 1741l
Covington, KY 41017-041l

Albert W. Jordan

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